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Supreme Court of the United States

October Term, 1946

Nos. 377, 452

JOSEPH S. FAY AND JAMES BOVE,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S SUPPLEMENTAL MEMORANDUM

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Introductory Statement

Upon oral argument, the Court requested information as to the history of special juries at common law and in the State of New York prior to the enactment of chapter 378 of the Laws of 1896, and as to the judicial treatment that statute and its successors have received from the New York courts. The historical material thus requested will be presented under the following headings:

A. Special juries at common law and in the State of New York prior to 1896;

B. Opinions of the courts of New York dealing with Chapter 378 of the Laws of 1896 and its successors.

In addition, appendices C, D and E (so designated to avoid confusion with appendices A and B of the respondent's brief) either set forth or summarize relevant New York statutes, beginning with colonial days, dealing with special juries and with the qualifications and exemptions of jurors. In Part Two of this memorandum, we set forth —without comment—certain factual material which appears relevant to questions arising upon the oral argument.

PART ONE — HISTORICAL MATERIAL

A

Special Juries at Common Law and in the State of New York prior to 1896.

"Special or struck juries were well known to the common law, their origin being so ancient that its date cannot be ascertained." [*Lommen* v. *Minneapolis Gaslight Co.* (1896) 65 Minn. 196, 211; see, also, *Anonymous* (1696) 1 Salk. 405; *King* v. *Burridge* (1724) 8 Mod. 245; *King* v. *Franklyn* (1731) 2 Barn. K. B. 95, 106; *Rex* v. *Waring MS* (1738) reported in *King* v. *Perry* (1793) 5 Durnf. & E. 453, 454; *Rex* v. *Hart* (1776) Cowp. 412; *Rex* v. *Wooler* (1817) 1 Barn. & Ald. 193, 202; *Rex* v. *Edmonds* (1821) 4 Barn. & Ald. 471, 476-477; 2 Lilly's *Practical Register* (2d ed. 1745) pp. 155, B, and 162, F. G. H; Thayer, *Preliminary Treatise on Evidence at the Common Law* (1898) pp. 94-97; Forsyth, *Trial by Jury* (1875) pp. 143-145; 1 Holdsworth, *History of English Law* (3d ed. 1922) p. 333; 17 Am. & Eng. Ency. of Law (2d ed. 1900) pp. 1196-1199.]

Thus, in *People* v. *Dunn*, 157 N. Y. 528, *infra*, pp. 5 to 6, the New York Court of Appeals referred to an instance "in 1450, (29 Hen. VI), of 'a petition for a special jury, that is jurors "who dwell within the shire, and

have lands and tenements to the yearly value of XX£" to try a plea which it was supposed might be pleaded in abatement on a bill of appeal of murder' " (at p. 534).

Such juries were, from the earliest times, recognized "in nearly all of the States of the Union" [*Eckrich* v. *St. Louis Transit Co.* (1903) 176 Mo. 621, 639], and have been used in New York at least since 1728. [Appendix C, *infra*, pp. 14-21; *Zenger's Case* (1735) 17 How. St. Tr. 676, 688-689; *Franklin* v. *Nore* (1797) Cole. & Cai. Cas. 52; *Spencer* v. *Sampson* (1804) 1 Caine 498; *Foot* v. *Croswell, id.*, 498; *Manhattan Company* v. *Lydig* (1805) Cole. & Cai. Cas. 423; *New-Windsor Turnpike Company* v. *Ellison* (1806) 1 Johns. 141; *People* v. *Tweed* (Sup. Ct. N. Y. Co. 1876) 50 How. Pr. 262, 263; Goebel and Naughton, *Law Enforcement in Colonial New York* (1944) pp. 168, 250, 534, 619-620, and manuscript cases cited therein showing use of a special jury in 1728; *Gulf &c. Railway Co.* v. *Shane*, 157 U. S. 348; *Anonymous* (C. C. D. Pa. 1797) Fed. Cas. No. 443; *Hall* v. *Perott* (C. C. E. D. Pa. 1830) Fed. Cas. No. 5942; *Parsons* v. *Philadelphia, W. & B. R. Co.* (1894) 16 Del. (2 Marv.) 379; *Inskeep* v. *Lecony* (1790) 1 N. J. L. 39; *State* v. *Murat* (1827) 9 N. J. L. 3; *Sutton* v. *State* (1839) 9 Ohio 133; *Ross* v. *Eason* (Pa. 1796) 2 Yeates 126; see, also, historical review of state legislation in *Lommen* v. *Minneapolis Gaslight Co., supra*, 65 Minn. 196, 212-214, 216; and U. S. C. A. Title 28, §418.]

The constitutionality of such juries has been upheld wherever assailed (*Brown* v. *New Jersey*, 175 U. S. 172; *People* v. *Dunn*, 157 N. Y. 528, *infra*, pp. 5 to 6; *Lommen* v. *Minneapolis Gaslight Co., supra*, 65 Minn. 196; *Eckrich* v. *St. Louis Transit Co., supra*, 176 Mo. 621).

Although the machinery for obtaining a common law special or struck jury was different from the one provided by the present New York statute, the basic purpose and characteristics of the two types of special juries are identical. With both, a jury commissioner or other public

official is empowered to select from the reservoir of general jurors a list of persons deemed by him especially qualified for use in cases of unusual importance or intricacy [compare N. Y. Laws of 1896, Ch. 378 with Thayer, *Preliminary Treatise on Evidence at the Common Law* (1898) p. 96; 3 Bl. Com. 357; 2 Burrill's *Law Dictionary* (1867) pp. 477-478; Duncombe, *Trials per Pais* (7th ed. 1739), p. 90; see, also, *Rex* v. *Edmonds, supra,* 4 Barn. & Ald. 471, 484-485].

While the present New York statute sets forth standards to guide the county clerk in selecting special jurors (see respondent's certiorari brief, p. 5), the struck jury system left their selection entirely to the unguided discretion of the official in charge. The struck jury statute upheld in *Brown* v. *New Jersey, supra,* 175 U. S. 172, authorized "the court" to "select from the persons qualified to serve as jurors * * * ninety-six names" from which the defendant and the prosecutor should each strike twenty-four (at pp. 174-175). Similarly, the statute considered in *Lommen* v. *Minneapolis Gaslight Co., supra,* 65 Minn. 196, empowered the sheriff to "select" from those "qualified to act as jurors in the county, 40 such persons as he shall think most indifferent between the parties, and best qualified" to try the issue (at. p. 206). Neither of these statutes provided any guiding standards. Nor were such standards set forth in any of the New York colonial or pre-1896 statutes (see Appendix C, *infra,* pp. 14-21; *cf. Rex* v. *Wooler, supra,* 1 Barn. & Ald. 193, 202).

The only other significant distinction is that the present New York statute seeks to provide a panel available to all litigants, whereas the struck jury system contemplated the creation of a special list to meet the needs of each particular case [compare *Industrial & General Trust, Ltd.* v. *Tod* (1st Dept. 1905) 104 App. Div. 517, 520, with *Jerome* v. *New York Evening Journal Publishing Co.* (1st Dept. 1908) 124 App. Div. 372, 375-376].

B

Opinions of the courts of New York dealing with Chapter 378 of the Laws of 1896 and its successors.

1. *The constitutionality of the statute*

Three years after its enactment, the validity of Chapter 378 of the Laws of 1896 was upheld by the New York Court of Appeals in *People* v. *Dunn* (1899) 157 N. Y. 528, 43 L. R. A. 247 (see respondent's certiorari brief, pp. 6-7; respondent's brief, p. 3). The case arose upon a question certified by the Appellate Division of the Supreme Court (157 N. Y., at p. 529):

> "'Is the act of the legislature embodied in chapter 378 of the Laws of 1896, providing for a special jury in criminal actions in certain cases, a valid and constitutional exercise of legislative power?'"

So far as here relevant, the appellant there attacked the legislation on three grounds, claiming (*id.*, at p. 532):

> "[A] that it is violative of the right of trial by jury;
>
> "[B] that it creates two classes of jurors and discriminates unequally; [and]
>
> "[C] that it delegates judicial powers to the special jury commissioner . . ."

After a thorough review of the historical development of special juries at common law (*id.*, pp. 533-536, see, also, 43 L. R. A., at p. 249), the court disposed of the foregoing contentions as follows:

As to due process (157 N. Y., at p. 538):

> "I think that we may dismiss the objections that the defendant is deprived by this act of due process of

law, or that it subjects him to any unequal discrimination, with the remark that, if he is secured a trial before an impartial jury taken from the county and conducted according to the law of the land, he has had all the benefit of the constitutional guaranty. No substantial right is infringed upon; for, as it is suggested in the opinion below, neither the letter nor the spirit of the Constitution guarantees to him a chance to select an ignorant or partial jury."

As to equal protection (*id.*, at p. 539):

"while it is, in a sense, true that the persons upon the two lists are differently qualified with respect to service in the criminal branch, it would be incorrect to regard that difference as other than one based upon their fitness for the jury service demanded. The argument that the defendant has more chances for success, or more rights, before a jury drawn from the general list is incomprehensible; unless upon the theory that he has some inherent, or substantial, right to the chance of making his defense before a jury composed of men whose ignorance, or partiality, or mental constitution might result in a disagreement, if not in an acquittal. That would be reducing the constitutional guaranty to an absurdity."

As to the claim that judicial powers had been delegated to the jury commissioners (*id.*, at pp. 538-539):

"Nor are any judicial powers delegated to the special jury commissioner. He exercises the same ministerial power that the ordinary commissioner of jurors does, in examining the qualifications of those liable to serve as jurors. He is the official created by the law, upon whom is devolved the duty of eliminating from the jury list persons declared by law to be unfit, or disqualified, to sit in criminal cases, and of having in readiness, for the time when a special jury is ordered by the court, for the better administration of justice, a list from which a panel of fit and impartial jurors may be chosen."

All subsequent attacks upon the constitutionality of the statute have, where opinions were delivered, been disposed of by reference to the foregoing decision [*People* v. *Meyer* (1900) 162 N. Y. 357, 361-362; *People* v. *Hall* (1901) 169 N. Y. 184, 194 (*cf. Hall* v. *Johnson*, 186 U. S. 480); *People* v. *Conklin* (1903) 175 N. Y. 333, 339; *People* v. *Wolter* (1911) 203 N. Y. 484, 491; see *People* v. *Buchalter* (1942) 289 N. Y. 181, 221, aff'd 319 U. S. 427, 430].

In the *Buchalter* case, the Court of Appeals succinctly observed (289 N. Y., at p. 221):

> "The statute is constitutional (*People* v. *Dunn*, 157 N. Y. 528) * * *."

In *People* v. *Lunse* (1938) 278 N. Y. 303, 314, the Court of Appeals held that the then existing exclusion of women from the special panel was no ground for challenging a jury selected therefrom.

2. *Denial of motions for change of venue on the ground that the issues were triable before a special jury*

Appellate courts, in upholding denials of motions for change of venue, have based their decisions upon the ground, among others, that the defendants had the opportunity to be tried before special juries and were thus assured of a fair and impartial trial in the county where the offense had been committed [see *People* v. *Buchalter*, *supra*, 289 N. Y. 181, 220-221, aff'd 319 U. S. 427; *People* v. *Hyde* (1st Dept. 1912) 149 App. Div. 131, aff'g 75 Misc. 407; *People* v. *Brindell* (1st Dept. 1921) 194 App. Div. 776].

In *People* v. *Hyde*, *supra*, the Appellate Division, in rejecting a claim that inordinate newspaper publicity required the removal of a trial from New York County, ruled (149 App. Div., at p. 136):

> "Considering the population of New York county, its large general jury list and its carefully selected special jury, we feel perfectly confident that it is not necessary to send this indictment for trial to any other county to enable the defendant to enjoy his undoubted right to a fair and impartial jury."

In the same case, Mr. Justice LEHMAN (later Chief Judge of the Court of Appeals), sitting at special term, had observed (75 Misc., at p. 417):

> "So far as the charge that the accused resigned while under indictment is concerned, I do not believe that any person fit to be a special juror regards this resignation as any admission of guilt * * *."

3. *Motions for trials before special juries in New York County*

So far as we have been able to determine, there are only three officially reported opinions dealing with motions made in New York County for trials before special juries [*People* v. *Edmondson* (Gen. Sess. 1937) 168 Misc. 141; *People* v. *Manganaro* (Gen. Sess. 1940) 174 Misc. 398; *People* v. *Elia* (Gen. Sess. 1940) 173 Misc. 1076, aff'd 262 App. Div. 836].

In the *Elia* case, Judge DONNELLAN, after rejecting the claim that special juries were "convicting juries," observed (173 Misc., at p. 1078):

> "The real objection to a special panel seems to be that they are selected after a more careful examination by the commissioner of jurors, and are supposed to be individuals of superior intelligence. Why this condition should work to the detriment of the defendants is something hard to understand."

In the *Manganaro* case, the same judge denied the district attorney's application for a special jury.

In an unreported opinion appearing in the New York Law Journal for January 23, 1940 (Vol. 103, No. 19, p. 354,

cols. 5 and 6), the Court of General Sessions granted a special jury for the trial of Elwood M. Rabenold, the president of the Clinton Trust Company (see respondent's certiorari brief, footnote 5, pp. 14-15). In the course of its opinion the court said:

> "the court will observe in passing that its experience has been that special juries render intelligent and impartial jury service and that in proper cases their employment tends to advance the proper administration of the criminal law."

4. *Use of special juries in civil cases*

By Chapter 602 (Section 5) of the Laws of 1901, the privilege of applying for special juries under the statute of 1896 was extended to litigants in civil cases. As far as we can determine, only four appellate decisions have dealt with that aspect of the statute [*Jerome* v. *New York Evening Journal Publishing Co.* (1st Dept. 1908) 124 App. Div. 372; *People* v. *McClellan* (1st Dept. 1908) 124 App. Div. 664; *Coler* v. *Brooklyn Daily Eagle* (2nd Dept. 1909) 133 App. Div. 300; *National City Bank* v. *Piluso* (2nd Dept. 1943) 266 App. Div. 854].

In *People* v. *McClellan, supra*, McClellan was called upon to defend his right to the office of Mayor of the City of New York. In directing that the case be tried before a special jury, the Appellate Division observed (124 App. Div., at pp. 664-665):

> "Not only does it [the case] involve the title to the principal administrative office of the city, but it is quite probable that its decision will turn upon questions of fact. For these reasons it is proper that it should be tried before a jury specially selected."

PART TWO — FACTUAL MATERIAL RELEVANT TO QUESTIONS ARISING ON ORAL ARGUMENT

1. *Petitioners' failure to show any pattern of alleged discrimination*

Mr. Justice BLACK asked if there were any evidence of a pattern of discrimination or other indication of systematic exclusion of any class or category of qualified jurors [*cf. Wong Yim* v. *United States* (C. C. A. 9th 1941) 118 Fed. (2d) 667, cert. den. 313 U. S. 589].

The petitioners' statements concerning the occupational composition of the list of special jurors all relate exclusively to its alleged condition on one particular day, January 31, 1945 (R. 82). This list "is being revised constantly, all the time" (R. 64). The following official figures, referred to upon oral argument, disclose the turnover for the five years preceding the petitioners' survey:

Year	*Placed on List*	*Removed from List*
1940	531*	717*
1941	395*	580*
1942	329	478
1943	411	248
1944	741	669
Total	2407*	2692*

2. *State of the record as to the manner in which women were alleged to have been recruited for general jury service*

Mr. Justice REED asked whether the record entitled the petitioners to raise any question in this Court concerning the manner in which women were recruited for general jury service (*cf.* respondent's certiorari brief, p. 10).

* As result of a recheck made by the county clerk, these figures are slightly different from those given on oral argument. The totals then given were: "Placed on List," 2413; "Removed from List," 2708.

As appears from the petitioners' brief (pp. 3-4), all constitutional questions are claimed to be raised by the petitioners' objection to the district attorney's motion for a special jury (R. 27-30), by the written challenge to the panel (R. 32-4), and by the petitioners' motions to set aside the verdict and in arrest of judgment (R. 503, 506). No criticism of the method of recruiting women for general jury service is found in any of the foregoing portions of the record, the only mention of women being in the challenge to the special panel, as follows (R. 34):

> "The special jury panel selected in this case was obtained * * * by the virtual exclusion from said Jury list of trade union representatives, laboring people and women."

Moreover, the record affirmatively establishes the petitioners' satisfaction with the general panel. Their opposition to the motion for a special jury was based on the assertion that (R. 27):

> "The application for a special jury is opposed on the ground that a trial by a 'blue ribbon jury' instead of a jury chosen from the regular panel will deprive these defendants of the right to a trial by a jury in accordance with the constitutional provisions."

3. *Type of cases tried before special juries*

Mr. Justice FRANKFURTER asked what kind of crimes had, in the past, been tried before special juries.

Ninety-four non-capital cases have been tried before such juries in the Court of General Sessions of the County of New York since 1929.* Of these, thirty-seven reached the appellate courts and therefore have records available for inspection. Footnote 5 on pages 14-15 of our certiorari brief lists all such cases tried since 1938. The table

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* For capital cases, see respondent's brief, Appendix B, pp. 31-32.

below* sets forth those tried between 1929 and 1938. No accurate records are readily available for the years before that.

*People v.	Crimes Charged	Citations	Defendants' Occupations
Baird 3 defendants	larceny	232 App. Div. 743	salesmen
Glenn	perjury	262 N. Y. 493	mechanic's helper
Stiglin	perjury	238 App. Div. 407	police officer
Kaplan	coercion	264 N. Y. 675	president (Local 306 Moving Picture Operators' Union of Greater New York)
Tait	perjury	259 N. Y. 599	police officer
Marcus 3 defendants	misapplication of bank funds	261 N. Y. 268	bank officers
Kresel	misapplication of bank funds	243 App. Div. 137	lawyer
Lewis 2 defendants	attempted rape	235 App. Div. 612	police officers
King	blackmail	246 App. Div. 516	novelist
Bitz	bail jumping	265 N. Y. 619	no occupation
Dilliard	false financial statement	271 N. Y. 403	real estate
McMurrough	manslaughter	247 App. Div. 712	chauffeur
Montana	compulsory prostitution	252 App. Div. 109	betting commissioner
Commonwealth Bond Corp. 3 defendants	larceny	276 N. Y. 611	real estate corporation and officers
Murphy 9 defendants	feloniously possessing machine gun	276 N. Y. 612	various (a)
Jacobs 2 defendants	extortion	280 N. Y. 562	attorneys
Hassett	bribery	251 App. Div. 883	plumber
Clarke 3 defendants	misleading advertisements	252 App. Div. 122	mortgage servicer, ass't vice-pres. and vice-pres. (Title Guarantee & Trust Company)
Ross	extortion	251 App. Div. 809	lawyer
Smolens 18 defendants	larceny	258 App. Div. 373	various (b)

(a) plumber, 3 laborers, lather, waitress, 2 housewives, tailor

(b) 3 real estate brokers, 7 salesmen, building superintendent, farmer, club manager, chef, editor, insurance agent, title reader, publisher. This case, tried in 1938, was not listed in footnote 5, page 14 of respondent's certiorari brief because the prosecution was conducted by the Attorney General and was not reflected in the files of the district attorney's office.

4. *Westbrook Pegler*

Mr. Medina suggested that the petitioners had been embarrassed by being confronted with special jurors who were followers of Westbrook Pegler. Only seven of the eighty-nine talesmen examined on the voir dire were found to be current readers of Pegler (R. 238, 248, 252, 268, 274, 278, 305; *cf.* R. 116, 126). Six of those talesmen were excused by the court (R. 239, 249, 252, 275, 281, 306). The seventh testified that (268):

> "I agree with you [petitioners' counsel] about Mr. Pegler."

He was "satisfactory" to both sides and served on the jury (R. 269).

The judgments under review should be affirmed.

Respectfully submitted,

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APPENDIX C

Special Jury Statutes in New York Prior to 1896

[Emphasis ours throughout.]

(A) *New York Colonial Statutes*

1. 3 Colonial Laws of New York, Ch. 720 (1741) pp. 185, 191-192:

"An Act for the Returning of Able & Sufficient Jurors, and for the better Regulation of Juries.

"For the returning more able & Sufficient Jurors, for Trials at Law hereafter to be had, and for Reformation and Abuses in Sheriffs, and other Ministers, who for Reward may be Tempted to Spare the most able, & Sufficient, and Return the Poorer and Simpler Freeholders & others Less able to descern the Causes in Question and to bear the Charges of appearance & attendance thereon.

* * *

"And be it further Enacted That It Shall & may be Lawfull for his Majestys Supreme Court of this Colony, Upon motion made, on behalf of his Majesty his Heirs or Successors, Or on the Motion of any Prosecutor or Defendant in any Indictment, or Information, in the nature of Quo Warranto depending, or to be brought or Prosecuted there, or on the motion of any Plaintiff or Plaintiffs Defendant or Defendants, in any Action Cause or Suit whatsoever depending or to be brought & carried on in the Said Court, and the Said Court is hereby Authorized & Required upon Motion as aforesaid, in any of the Cases before Mentioned, To order & appoint a Jury to be Struck before one of the Judges of the Said Court, for Trial of any Issue joined in any of the said Cases, and Triable by a Jury of Twelve Men, **in Such manner as Special Jurys have by Law heretofore been Struck for Tryals at Bar,** which Jury so Struck as Aforesaid, Shall be the Jury returned for the Trial of the Said Issue.

* * *

Appendix C

"THIS ACT to continue & remain of Force from the Said Twenty Fifth day of March Until the Twenty Fifth day of March, which will be in the Year of our Lord one Thousand Seven Hundred & Forty Seven"

2. 3 Colonial Laws of New York, Ch. 836 (1746) p. 599:

"WHEREAS an Act, Entituled an Act, for the returning of able and Sufficient Jurors, & for the better Regulation of Jurys passed in the Fifteenth year of his Majesties Reign, will expire on the Twenty Fifth of March next & the same having been found greatly advantagious to the Inhabitants of this Colony.

"BE IT ENACTED by his Excellency the Governour, the Council, & the General Assembly, And it is hereby Enacted by the Authority of the same, That the above mentioned Act, Entituled an Act for the returning of able & Sufficient Jurors & for the better Regulation of Jurys, Shall be, & hereby is continued, and every Clause, Article, Matter & Thing therein contained Enacted to be & remain of full Force & Virtue to all Intents Constructions & Purposes whatsoever, and is hereby made Perpetrual."

(B) *New York State Statutes*

1. Laws of 1786, Ch. 41, Republished Ed., pp. 273, 279-280:

"*And be it further enacted by the authority aforesaid,* That it shall and may be lawful for the said supreme court, and the several inferior courts and mayors courts herein before mentioned, upon motion, in behalf of the people of this State or of any prosecutor or defendant in any indictment or information, other than for capital offences, or of any plaintiff, demandant avowant defendant or tenant in any action cause or suit whatsoever depending, or to be had, brought, prosecuted or carried on in any of the said courts, and triable by a jury of twelve men, to order and appoint a jury to be struck for the trial thereof.

And in such case the said courts shall order the sheriff of the proper county, or other officer who ought to impanel the jury in such case to bring into the office of the clerk of the said court at a certain day a book containing the names of the several persons in his county or bailiwic qualified to serve as jurors on such trial, with their places of abode and additions; and after the return of such book the party applying for such struck jury shall give due notice to the opposite party, and to the clerk of the said court, or his deputy, of the time and place of striking such jury; **at which time and place the clerk of the said court or his deputy shall** attend with the said book, and shall in the presence of the parties, or such of them as shall attend for that purpose, **copy out of the said book the names of forty eight such persons,** with their places of abode and additions, **as he shall think most indifferent between the parties, and best qualified to try such cause or issue;** and then the party applying for such struck jury or his agent or attorney shall first strike out one of the said names, and then the opposite party or his agent or attorney another, and so alternately until each shall have struck out twelve: But if such opposite party shall not attend such striking, nor any person in his behalf, then the said clerk or his deputy shall strike for the party not attending. And when each have struck out twelve as aforesaid, the remaining twenty four shall be the jury to be returned to try the said cause or issue. And the clerk of the said court or his deputy shall thereupon make a fair copy of the names of the same remaining twenty four persons, with their places of abode and additions, and certify the same under his hand to be the list of jurors struck as aforesaid for the tryal of such cause or issue, which list shall be delivered to the sheriff or other officer who ought to summon such jury, together with the venire facias; and such sheriff or other officer shall thereupon annex the same list to such venire facias, and return the same as the panel of the jury to try such cause or issue, and summon them according to the command of the

same writ. And upon the trial of such cause or issue there shall be no balloting, but the jurors so struck shall be called as they stand upon the panel, and the first twelve of them who shall appear and are not challenged, or shall be found duly qualified and indifferent, shall be the jury and be sworn to try the said cause or issue; but the person or party who shall apply for such struck jury shall bear and pay the fees for striking thereof, and shall not have any allowance for the same upon the taxation of costs."

2. Laws of 1801, Ch. 98, Republished Ed., pp. 375, 384-385:

"XXII. *And be it further enacted*, That no struck jury shall be allowed unless on the order of the court, when they may deem it necessary by reason of the importance or intricacy of the case; and whenever they shall so deem it necessary, it shall be lawful for the supreme court or the court of common pleas or mayor's court in which the cause is depending, to order the clerk of the county to return into the office of the clerk of the said court, or if the clerk of the county be the clerk of the said court, then to have ready in his office at a certain day, a book containing the names of the several persons in his county qualified to serve as jurors on such trial, with their places of abode and additions, and after the return of such book the party applying for such struck jury shall give due notice to the opposite party, and to the clerk of the said court or his deputy, of the time and place of striking such jury, at which time and place **the clerk of the said court or his deputy shall** attend with the said book, and shall in the presence of the parties, or such of them as shall attend for that purpose, **copy out of the said book the names of forty-eight such persons with their places of abode and additions, as he shall think most indifferent between the parties and best qualified to try such cause**; and then the party applying for such struck jury or his agent or attorney, shall first strike out one of the

said names, and then the opposite party or his agent or attorney another, and so alternately until each shall have struck out twelve; but if such opposite party shall not attend such striking, nor any person in his behalf, then the said clerk or his deputy shall strike for the party not attending, and when each have struck out twelve as aforesaid, the remaining twenty-four shall be the jury to be returned to try the said cause; and the clerk of the said court or his deputy shall thereupon make a fair copy of the names of the said remaining twenty-four persons, with their places of abode and additions and certify the same under his hand to be the list of jurors struck as aforesaid for the trial of such cause or issue; which list shall be delivered to the sheriff or other officer who ought to summon such jury, together with the venire facias; and such sheriff or other officer shall thereupon annex the same list to such venire, and return the same as the panel of the jury to try such cause, and summon them according to the command of the same writ; and upon the trial of such cause there shall be no balloting, but the jurors so struck shall be called as they stand upon the panel, and the first twelve of them who shall appear and are not challenged, or shall be found duly qualified and indifferent, shall be the jury and be sworn to try the said cause; but the party who shall apply for such struck jury shall pay the fees for striking thereof, and shall not have any allowance for the same upon the taxation of costs; *Provided always*, That if the clerk of such court shall be interested in the cause or related to either of the parties, or if it shall appear probable to the court that he is not indifferent between them, then and in every such case the court shall nominate two proper persons who are indifferent between the parties to strike the jury, which persons shall do and perform every thing required to be done by such clerk relating to the striking of such jury."

[Re-enacted by Laws of 1813, Ch. 4 (R. I.) Vol. 1, pp. 325, 333-334]

Appendix C

3. Revised Statutes (1829, 1st Ed.) Vol. 2, p. 418:

"*Of Special Juries.*

* * *

"§46. When it shall appear to the supreme court, or to any court of common pleas, in which any cause shall be pending, that a fair and impartial trial will be more likely to be obtained by having a struck jury, or that the importance or intricacy of the cause requires such a jury, such court shall order a special jury to be struck for the trial of such cause."

* * * *

"§48. At the time appointed, the clerk of the county shall attend at his office, with the original lists of the jurors returned to him by the officers of the several towns, who are then liable to serve, and in the presence of the parties, or their counsel, shall proceed to strike a jury as follows:

"1. The clerk shall select from such lists the names of forty-eight persons, **whom he shall deem** most indifferent between the parties, and best qualified to try such cause:

"2. The party on whose application such struck jury was ordered, or his attorney, shall then first strike out one of the said names, and the opposite party or his agent shall strike out another of such names, and so alternately until each party shall have striken out twelve names:

"3. If either party shall fail to attend at the time and place of striking such jurors, or shall neglect to strike out any names according to the foregoing provisions, the clerk shall strike for such party:

"4. The clerk shall thereupon make out a list of the names of the twenty-four persons not stricken out, and certify the same to be the persons drawn to serve as jurors pursuant to the order of the court, and shall deliver such list so certified to the sheriff of the county."

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This statute remained in effect through 1896 with minor amendments. [See Revised Statutes (1836, 2nd Ed.) Vol. 2, pp. 338-339; *id.* (1846, 3rd Ed.) Vol. 2, pp. 514-515; *id.* (1852, 4th Ed.) Vol. 2, pp. 665-666; *id.* (1858, 5th Ed.) Vol. 3, pp. 716-717; *id.* (1875, 6th Ed.) Vol. 3, pp. 704-705; Code of Civil Procedure (1882, Throop Ed.) §§1063-1065, 1069, pp. 447-449.]

The amendments mentioned were as follows:

By the Revised Statutes of 1852 (4th Ed., Vol. II, p. 665) Section 46 of the Revised Statutes, *supra*, p. 19, was renumbered and amended to read as follows:

> "§56. [Sec. 46.] When it shall appear to the supreme court, or to any county court in which any cause shall be pending, that a fair and impartial trial will be more likely to be obtained by having a struck jury, or that the importance or intricacy of the cause requires such a jury, such court shall order a special jury to be struck for the trial of such cause."

By the Revised Statutes of 1858 (5th Ed., Vol. 2, p. 716) this same section was further amended to read as follows:

> "§112. [Sec. 46.] When it shall appear to the supreme court, or to any county court, or to the superior court of the city of New York, or to the superior court of Buffalo, in which any cause shall be pending, that a fair and impartial trial cannot be had without a struck jury, or that the importance or intricacy of the cause requires such a jury, such court shall order a special jury to be struck for the trial of such cause."

By the Laws of 1895, Ch. 946, p. 830, this same section as it appeared in the Code of Civil Procedure was further amended to read as follows:

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"§1063. *What courts may order a special jury to be struck.*—Where it appears to the court, that a fair and impartial trial of an issue of fact, triable by a jury, joined in an action, pending in the supreme court, can not be had without a struck jury, or that the importance or intricacy of the case requires such a jury, the court must make an order, upon notice, directing a special jury to be struck, for the trial of the issue. The order must specify the term, and it may specify a particular day in the term, when the jurors must attend."

This last section, subsequently incorporated into the Civil Practice Act (C. P. A., §449), remained in effect until repealed in 1937 (L. 1937, Ch. 532). However, after the special jury provision of Chapter 378 of the Laws of 1896 became available to litigants in civil as well as in criminal cases (L. 1901, Ch. 602, §5), the struck jury statute fell into disuse [see *Jerome* v. *New York Evening Journal Publishing Co.* (1st Dept. 1908) 124 App. Div. 372, 376; *People* v. *McClellan*, *id.*, pp. 664, 665].

APPENDIX D

Summary of Statutes on Property Qualifications for Jury Service in New York

A. *Colonial Statutes*

1 Colonial Laws of New York [Duke of York's Laws, 1665-1675], p. 42:

"JURORS AND JURYES.

"That the Clarke of the Sessions shall in Convenient time before the Sitting of the Court give a a Certificate to the Sheriffe or under Sheriff of what and how many Causes are entered for their hearing the next Sessions to the end the Sheriff or under Sheriff may (and are hereby required) Immediately to Issue forth warrants to the Constable of the Severall Towners of the Jurisdiction of the Court or Jurymen proportionable to the Causes with regard to the equality of the number from each Town and according to the warrant The Constable shall warn so many of **the Overseers to attend as Jurymen** and return their names to the under Sheriff, And if such Number of Jury men so required, prove not Sufficient for Carrying on the business with dispatch to the Sessions The Justices may require the Sheriffe or under Sheriffe, to Supply their number with so many **able and discreet men** as shall either attend the Court upon other occasions, or shall happen to be Inhabitants of the Towne where the Court shall be held.

* * *

"No Jury shall exceed the number of Seaven nor be under Six unless in Special Causes upon Life and Death, The Justices shall thinke fitt to Appoint twelve."

Appendix D

1 Colonial Laws of New York, Ch. 66 (1699), pp. 387-388:

"A Bill for ye Regulating and returning of able and Sufficient Jurors in Tryalls at Law

[Passed, May 16, 1699.]

"Whereas great hurt & damage does arise to ye Inhabitants of this province by reason of ye great abuses in ye returning of Jurors not Sufficiently qualified to discern ye Causes in question upon Tryalls between party & party That ye Same for ye future may be remedyed & y't able & Sufficient Jurors for Tryalls hereafter to be had may be duely returned by ye Sheriffs & other officers authorized for y't service BEE IT ENACTED * * * **that all Jurors** who are to be returned for ye tryalls of Issues Joined in any of his Ma'tys Supream or Inferiour Court or Courts of May'rs & Aldermen within this province who shall have Conginzance of any please of his Ma'tys Courts of Kings Bench Comon pleas or Exchequer or before any Justices of Assize or nisi-prius Oyer and Terminer Goale Delivery or Generall or quarter Sessions of ye peace from & after ye publication hereof in any Citty or County of this province **shall every of them then have in their owne name and right a good house or message with tenn acres of Land of ffreehold (in ye respective Countys wherein they doe reside & in ye Cittys of New York & Albany one dwelling house free from all Incumbrances or a personall Estate to ye value of ffifty pounds Currant money of this province free & Cleer from all debts** & Lawfull demands whatsoever in ye Same Citty towne & County where Such Jurors shall reside all w'ch persons haveing Such Estate in manner aforesaid are hereby Enabled and made Liable & Sufficiently qualified to be returned and to Serve as Jurors for ye tryalls of Issues before ye Justices & Courts aforesaid any Law or Statute to ye Contrary notwithstanding and if any person of a lesser Estate and Value shall be respectively returned upon any Such Jury or tales in Default of Such Jurors it shall be a good Cause of

Challenge and ye party returned shall be discharged upon ye Said Challenge or his owne Allegation & Oath thereof & y't ye Same hereafter may be duely observed. The Writt of Venire facias w'ch shall hereafter be awarded and Directed for ye Impanneling of Juryes in Cases aforesaid w'thin any Citty & County w'thin this province shall have menconed in ye body thereof twelve free & Lawful men of ye Neighbourhood of w'ch **each of y'm shall have in their owne Name and right a good house or message w'th tenn Acres of Land of ffrehold in ye County & ye Cittys of New York & Albany a dwelling house free from all Incumbrance or a personall Estate to ye Value of fifty pounds free & Cleer from all Debts & Lawfull demands w'tsoever** and ye preamble and residue of ye Said Writt shall be after ye usuall manner and y't upon every Such Writt & writts of Venire, facias the Sheriff Coroner or other minister of each respective Citty and County in this province unto whom ye makeing of ye pannell Shall appertaine Shall not returne any person in any Such pannell unless he Shall then have ye Estate as aforesaid respectively in ye Same Cittys & Countys where ye Issue is to be tryed. • • •

This act remained in effect until 1733 [see 1 Colonial Laws of New York, Ch. 214 (1710) p. 708; *id.*, Ch. 367 (1719) p. 1021; 2 *id.*, Ch. 493 (1726) p. 345]. Apparently no statute prescribing qualifications for jurors was ineffect from 1733 to 1741.

In 1741 a new statute was enacted which made the property qualification for jurors sixty pounds [3 Colonial Laws of New York, Ch. 720 (1741) p. 185], which application remained in effect until after formation of the Union [*id.* (1746) Ch. 836, p. 599].

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B. *Laws of State of New York*

Laws of 1786, Ch. 49, Republished Ed., pp. 273, 275:

"IX. **And be it further enacted by the authority aforesaid,** That all jurors (other than strangers upon trials per medietatem linguae) who shall be returned upon trials of issues in the supreme court, or in any of the circuit courts, or in any of inferior courts of common pleas, or in the mayors courts of the cities of New York, Albany or Hudson; or in any court of general or quarter sessions of the peace, or before any justices of assize, oyer and terminer or goal delivery in any city or county of this State, or in any other court of record, shall every of them be above the age of twenty one and under the age of sixty years and shall each of them have in either of the said counties in his own name or right, or in trust for him or in his wifes right in the same county, **a freehold in lands messuages or tenements, or of rents in fee or for life, of the value of sixty pounds, free of all reprizes debts demands or incumbrances whatsoever; and in the cities of New York Albany or Hudson a freehold of the value aforesaid, or a personal estate of the like value free from all reprises debts, demands or incumbrances whatsoever.** And all men having such estates as aforesaid are hereby enabled and made liable to be returned and to serve as jurors for the trials of issues before the judges, justices, and courts aforesaid; and if any man not so qualified shall be returned upon any such jury, or tales in default of such jurors, it shall be good cause of challenge to the juror not so qualified, and such person so returned shall be discharged upon such challenge or his own allegation and oath thereof • • •"

In 1801 (Laws of 1801, Ch. 98, 2d Ed., pp. 377-378), the property qualification became freehold or personal estate of the value of $150 free of all reprises, common debts,

demands or incumbrances whatsoever. The amount remained the same in 1813 [Laws of 1813, Ch. 4 (R. L.), pp. 327-328]. In 1829, the amount was $250 in personal property or a freehold estate valued at $150 [2 Revised Statutes (1829, 1st Ed.) p. 411]. This property qualification continued until 1882 [2 Revised Statutes (1836, 2nd Ed.) p. 332; 2 Revised Statutes (1846, 3rd Ed.) p. 508; 2 Revised Statutes (1852, 4th Ed.) p. 656; 3 Revised Statutes (1859, 5th Ed.) p. 695; 3 Revised Statutes (1875, 6th Ed.) p. 676]. In 1882, the property qualification in New York County was real or personal property of the value of $250 [Code of Civil Procedure (Throop Ed. 1882) §1079, p. 454]. Since that time, this qualification has remained unchanged [Judiciary Law, §596 (1946)].

APPENDIX E

Summary of Exemptions from Jury Service by Statute in New York

Periods and Statutes	*Exempt Groups*
1786-1801 [L. 1786, ch. 41, p. 282]	Firemen of New York, Brooklyn and Albany.
1801-1829 [L. 1801, ch. 97, p. 224, *id.* (1813) ch. 4, p. 335]	State militiamen and commissioned officers of the same within the City of New York; firemen; State prison inspectors; wardens of the Port; health commissioners; agents, superintendents, artificers and workmen of every kind employed in and about Albany Glass Factory; Quakers or reputed Quakers in trials of treason or murder.
1829-1846 [1 *Rev. Stat.* (1829, 1st Ed.) pp. 250, 278, 324; 1 *id.* (1836, 2d Ed.) pp. 233, 269, 317, 639]	Toll collectors, clerks, repair superintendents, lock-tenders, boat inspectors and weigh-masters employed on canals; superintendent, inspector, deputies and all persons employed in manufacture of coarse salt; non-commissioned officers, musicians and privates of State militia; keepers of poor houses, alms-houses and other such places.
1846-1859 [1 *Rev. Stat.* (1846, 3d Ed.) pp. 282, 318, 362, 797-798, 410; 2 *id.* 511, 512; 1 *id.*	Same as from 1829 to 1846. In addition: firemen; persons in employ of any glass, cotton, linen, woolen or iron

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 452

JAMES BOVE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOSES POLAKOFF,
Counsel for Petitioner.

SAMUEL MEZANSKY,
Of Counsel.

York, New York County, it was stipulated that an objection by either counsel for the petitioner, Joseph S. Fay or the petitioner, James Bove shall apply to both petitioners, unless specifically stated by counsel at the time (fols. 438-439).

The petitioner raised the Federal questions sought to be reviewed in the same manner as raised by the petitioner, Joseph S. Fay.

Petitioner's counsel objected to an order directing that the petitioner be tried before a Special Jury (fols. 175-182). Petitioner, through his counsel, filed a written challenge to the Special Jury Panel (fols. 182-195), in accordance with Sections 362-363 of the Code of Criminal Procedure of the State of New York.

Petitioner's notice of appeal specifically brought up for review the order of the trial justice directing trial by a Special Jury and the order overruling the challenge to the special panel of jurors (fols. 10-15).

In the interest of brevity and to avoid repetition, your petitioner does not in this petition recite the facts which appear fully in the petition of Joseph S. Fay.

Your petitioner adopts these facts and also the reasons urged in the petition of Joseph S. Fay for the granting of the petition.

Your petitioner also urges for the reasons more fully set forth in the petition of Joseph S. Fay that the trial of your petitioner before a Special Jury in the manner set forth in the petition of Joseph S. Fay violated petitioner's fundamental constitutional rights and privileges.

Conclusion

It is therefore respectfully submitted that this petition be consolidated with the petition of Joseph S. Fay, docketed on the 9th day of August, 1946, and bearing Docket No. 377

and that this petition for a writ of certiorari be granted.
Dated, New York, N. Y., August 30th, 1946.

Respectfully submitted,

MOSES POLAKOFF,
Attorney for Petitioner.

SAMUEL MEZANSKY,
Of Counsel.

(6447)

(1852, 4th Ed.) pp. 518, 553, 630; 2 *id.* pp. 24, 660, 662]	manufacturing company, by the year, month or season; ministers of the gospel; teachers in any college or academy; practising physician with patients requiring his attention; surrogate, justice of the peace or employe in civil office with duties inconsistent with jury attendance; teacher in any school.
1859 to 1875 [1 *Rev. Stat.* (1859, 5th Ed.) pp. 639, 680, 772; 2 *id.* 855, 1011; 3 *id.* 700, 713, 714]	Same as from 1829 to 1859. In addition: policemen.
1875 to 1882 [1 *Rev. Stat.* (1875, 6th Ed.) pp. 705, 731, 813; 2 *id.* 636, 848, 855, 872, 929, 1026; 3 *id.* 676, 701]	Same as from 1829 to 1875. In addition: operators, clerks and other persons employed by telegraph companies; resident officers and teachers in lunatic asylums; those who observe the Sabbath on Saturday exempt on that day from service.
1882 to 1889 [1 *Rev. Stat.* (1882, 7th Ed.) pp. 703, 732, 786, 859, 893, 910; 2 *id.* 1723, 1729; 3 *id.* 1867, 1910, 1935, 1976, 2619, 2621; *Code of Civil Procedure* (1882, Throop Ed.) §1081, pp. 454-455; 1 *Rev. Stat.* (1889, 8th Ed.) pp. 777, 812; 2 *id.* 858, 991; 3 *id.* 2064, 2120, 2181; 4 *id.* 2819]	Same as from 1829 to 1882. In addition: prison guards; licensed pharmacists; attorneys; consuls; ship officers and pilots; railroad superintendents, conductors and engineers.

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1889 to 1909 [L. 1889, ch. 296, pp. 370-371; L. 1898, ch. 318, p. 941; L. 1905, ch. 437, p. 971]	Same as from 1829 to 1889. In addition: veterans of 5 years' service in national guard; surgeon dentist; and editor, editorial writer, artist or reporter of a daily newspaper or press association.
1909 to 1917 [Consolidated Laws of 1909, §635; Judiciary Law (1917 Ed.) §635]	In 1909, the parent statute of the present Judiciary Law, §599, set forth the following exemptions: clergymen; physicians; dentists; pharmacists; veterinary surgeons; embalmers; attorneys; teachers; office holders under local, State or Federal government; consuls; ship officers and pilots; railroad and telegraph employes; veterans of 7 years' service; members of national guard; firemen; policemen and steam boiler engineers.
1917 to 1936 [L. 1921, ch. 703, p. 2485; L. 1935, ch. 771, p. 1497; L. 1936, ch. 890, p. 1998]	Same as 1909 to 1917. In addition: optometrists; volunteer firemen; members of army, navy or marine corps of the United States.
1936 to present [L. 1936, ch. 890, pp. 1996-1997; L. 1937, ch. 513, p. 1173; L. 1943, ch. 447, p. 1009]	In 1936, all former exemptions were repealed. Only groups exempted henceforth were: clergymen; physicians; dentists; pharmacists; embalmers; optometrists; attorneys; members of the army, navy or marine corps; firemen; policemen; ship officers and pilots. In 1937, women were added. In 1943, editors, editorial writers, sub editors, reporters and copy readers were added.

Appendix E

April 7, 1943 to April 1, 1946

Article IX-A of the New York State War Emergency Act provided for the excuse from jury service of war workers and military personnel [L. 1943, Ch. 361; repealed by L. 1946, Ch. 445]:

"§95. Purpose and application of article

"It is the purpose of this article to prevent any interruption in the production and flow of materials necessary for the successful prosecution of the existing state of war by establishing a uniform, state-wide procedure to be followed by persons who are engaged in the production and movement of such materials in obtaining excuse from jury service without personally appearing in court to present their applications to be excused from such service. The provisions of this article shall apply to all persons hereafter summoned or notified to attend as grand jurors or trial jurors in any court of the state who are necessary employees in essential war industries or occupations or who are members of the armed forces of the United States or of any auxiliary thereof.

"§96. Notice containing special instructions for obtaining excuse from jury service to accompany all jury duty summonses and notices hereafter served

"It shall be the duty of the commissioner of jurors, the sheriff and of every other public officer or body charged with the duty of summoning persons to attend for service as grand jurors or trial jurors in any court of this state to send to or serve upon each person hereafter summoned for such service, a notice which shall accompany such summons, be annexed thereto, or endorsed thereon, and which shall be in substantially the following form:

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"SPECIAL INSTRUCTIONS FOR OBTAINING EXCUSE FROM JURY SERVICE WITHOUT PERSONAL APPEARANCE IN COURT

"A. For Necessary Employees in Essential War Industries and Occupations

"If you are a necessary employee in an essential war industry or occupation, you may be excused from attending for service as a juror as required by the (here insert enclosed or attached) summons, or have your time of service postponed, by complying with the following instructions:

• • •

"4. Send the application, together with the jury summons or notice, by mail or messenger, to (here insert name and address of presiding judge of court) not later than 2 p. m. on the Wednesday preceding the date specified in the summons for your appearance.

"IT IS NOT NECESSARY FOR YOU TO APPEAR IN COURT PERSONALLY TO PRESENT YOUR EXCUSE. You or your representative will be notified of the action taken upon your application prior to the time specified in the summons for your appearance in court. A denial of your application will not prevent you from presenting to the court at the time specified for your appearance therein an application to be excused from jury service on any ground set forth in your application under this section or for any other reason or cause.

• • •

"**§98. Inconsistent acts superseded**

"All acts and parts of acts inconsistent with the provisions of this act are hereby superseded and suspended in their operation for the period during which this article remains in effect."